No. 50333-6-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

SVETLANA KUDINA,

Appellant,

v.

CITIMORTGAGE, INC., a foreign (non-Washington incorporated) entity; QUALITY LOAN SERVICE CORPORATION, a Washington corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a foreign (non-Washington incorporated) entity; and DOES 1-10,

Respondents.

BRIEF OF RESPONDENTS CITIMORTGAGE, INC. AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

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A. INTRODUCTION

This appeal is the result of a now represented, but formerly *pro se* plaintiff's regret in not hiring counsel sooner. Plaintiff Svetlana Kudina ("Kudina") owns residential real property in Washington, which is secured by a loan. After Kudina defaulted, defendant CitiMortgage, Inc. ("CMI") attempted to foreclose and in 2010, Kudina filed an action against CMI in the United States District Court for the Western District of Washington to try to stop the foreclosure. Kudina appeared *pro se* in that case. After cross-motions for summary judgment were filed, the District Court denied Kudina's motion and granted CMI's motion on the ground that Kudina had not established the viability of her claims and could not do so.

Kudina appealed the District Court decision to the Ninth Circuit Court of Appeals. She continued to appear *pro se*. The Ninth Circuit Court of Appeals affirmed the District Court in March of 2014.

Two years after the 9th Circuit affirmed that dismissal, Kudina, now represented, filed a second action, this time in the Superior Court for Clark County. In this suit, which is the subject of this appeal, she also named defendants Mortgage Electronic Registration Systems, Inc. ("MERS") and Quality Loan Service Corporation ("QLS").

CMI and MERS filed a CR 12(b)(6) motion to dismiss on the grounds that Kudina's claims were barred by the doctrine of *res judicata*,

or claim preclusion. QLS joined in the motion. The Superior Court granted the motion, and Kudina now appeals.

Kudina's failure to hire counsel in the District Court case, and the post-judgment *Bain v. Metropolitan Mortgage Group, Inc*. decision, do not provide Kudina with a second chance to litigate the claims she could have, but failed to bring in the District Court matter. For the reasons discussed below, the Superior Court's grant of CMI's and MERS' motion to dismiss should be affirmed.

B. RESPONSE TO ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

CMI and MERS disagree with Kudina's assertion that the doctrine of collateral estoppel is applicable or that it was applied by the trial court. See section E.3, below. CMI and MERS otherwise have no specific objection to Kudina's Assignments of Error and Issues Pertaining to Assignments of Error as they are set forth in Kudina's Brief of Appellant, p. 5.

C. STATEMENT OF THE CASE

Almost seven years ago, on December 15, 2010, Kudina, appearing *pro se,* initiated an action against CMI in the United States District Court for the Western District of Washington, Case No. 3:10-cv-05887-RBL (the "District Court case"). CP 240-251. She styled the

District Court case as an "Adversary Complaint Under 'Fair Debt Collection Practices Act'" and in her initial complaint she denied she was in default on her loan for residential real property, asserted CMI was improperly collecting on a debt, and asserted CMI was wrongfully attempting to foreclose.[1] Kudina sought to temporarily and permanently enjoin CMI from foreclosing, and also sought money damages. CP 242. In that initial complaint, Kudina asserted Northwest Trustee Services, Inc. was an agent of CMI that was improperly initiating foreclosure proceedings.[2] Northwest Trustee Services, Inc., however, was not named as a defendant in the District Court case. CP 240.

On January 11, 2011, Kudina, still appearing *pro se*, filed an amended complaint in the District Court case. CP 252-256. Although Kudina's causes of action were split in the amended complaint into three sections (styled as injunctive relief, tortious fraud and deceit, and negligence), she again asserted that she was not in default on the loan and

[1] See, e.g., CP 240, where Kudina references the "Fair Debt Collection Practices Act;" CP 241-242, where she states "[D]efendant is effectively…attempting to collect a debt that has already been discharged;" and where she states, "attempts to use the non-judicial foreclosure procedure are contrary to the orders of this court, and are in fact based on the fraudulent representation that the debtor owes [CMI] money which has in fact already been paid." CP 242.

[2] "Defendant's agent, Northwest Trustee Services, Inc., has now again initiated foreclosure proceedings…based on the false premise that the debtor is in default…" CP 141. Also see, CP 247.

that CMI was wrongfully attempting to foreclose. *Id*. Kudina again sought to temporarily and permanently enjoin CMI from foreclosing, and also sought money damages, but again did not name Northwest Trustee Services, Inc. as a party. *Id*.

On June 21, 2011, Kudina filed a motion for summary judgment in the District Court case. CP 257-285. In her motion, she again claimed she was not in default on the loan and that CMI was wrongfully attempting to foreclose. CP 266-267. On July 18, 2011, CMI responded to the summary judgment and cross-moved to dismiss and for summary judgment. CP 286-307. Attached to the declaration in support of the response and cross-motions was a copy of the Deed of Trust (CP 343-353), which identifies MERS. (CP 344). On October 26, 2011, the District Court denied Kudina's motion for summary judgment and granted CMI's motion for summary judgment. CP 434-438.

Kudina (still *pro se*) appealed the District Court case to the Ninth Circuit Court of Appeals on October 28, 2011. CP 440-441. Kudina argued "the district court's alleged unfamiliarity with the record, the status of formal foreclosure proceedings, the implications of a post-judgment refund check from CitiMortgage, and the application of the decision in *Bain v. Metropolitan Mortgage Group, Inc*., 285 P.3d 34 (Wash. 2012)". CP 443. The Ninth Circuit Court of Appeals allowed Kudina to

supplement the record and allowed a request she made for judicial notice but nevertheless found her arguments (including application of the *Bain* case) "unpersuasive." CP 443-444. On March 18, 2014, the Ninth Circuit affirmed the decision of the District Court. *Id.* Kudina never named Northwest Trustee Services, Inc. or MERS as parties in the District Court case.

Two years later, on August 15, 2016, Kudina (now represented for the first time by counsel) filed a new action in Clark County Superior Court, Case No. 16-2-05554-4 (the "current case" or "Superior Court case"). CP 3-16. The Superior Court case was brought against not only CMI, but also MERS and QLS. *Id.* The initial Superior Court complaint asserts that QLS "was allegedly substituted as the 'Trustee' for purposes of initiating a non-judicial foreclosure."[3] The initial complaint sought declaratory relief regarding CMI's rights in relation to the Note and Deed of Trust, asserted against all defendants violations of Washington's Consumer Protection Act (relating to the defendants allegedly having no interest in the Note or Deed of Trust), and asserted a fraud claim against CMI. CP 3-16. The fraud claim related both to allegations that CMI had no interest in the Deed of Trust and that Kudina was allegedly not in default on her loan. CP 5.

[3] CP 5.

On September 9, 2016, Kudina (through counsel) filed an amended complaint. CP 148-167. Like the first complaint, the amended complaint named CMI, MERS, and QLS as defendants. *Id*. Again, the complaint sought declaratory relief regarding CMI's rights in relation to the Note and Deed of Trust, but added requests for declarations regarding MERS and QLS. CP 159. The amended complaint again asserted against all defendants violations of Washington's Consumer Protection Act, and asserted a fraud claim, now against all defendants.[4] In other words, like the District Court case, Kudina's Superior Court case denies she was in default on her loan, asserts improper collection on a debt, and asserts wrongful attempts to foreclose.

On October 3, 2016, CMI and MERS filed a motion to dismiss the amended complaint pursuant to CR 12(b)(6) on the grounds that Kudina could have and should have brought all of her claims against CMI, MERS, and the trustee in the District Court case. CP 225-235. CMI and MERS also requested that the Court take judicial notice of the District Court case. QLS joined in the motion. CP 222. Kudina responded (CP 446-458),

[4] CP 163-167. Both the initial Superior Court complaint and amended Superior Court complaint also included requests for injunctive relief, but the amended complaint noted "[a]t the time of the filing of the original Complaint, a Trustee's Sale had been scheduled by defendant QLS for August 26, 2016. That sale has been cancelled by counsel for Defendants CMI and MERS, and has not been rescheduled." CP 152.

CMI and MERS replied (CP 463-470), and on April 21, 2017 the Superior Court took judicial notice of the District Court case and granted the motion to dismiss, holding:

> The Court grants [the motion] for the reasons set forth therein. Specifically, Plaintiff is precluded from re-litigating claims that were brought or *could have been brought* in the prior federal litigation. Indeed, arguments made in the case of Bain v. Metropolitan Mortgage Group, 175 Wn.2d 83, 285 P.3d 34 (2012), could have been brought at the time of the federal lawsuit, regardless of whether or not the arguments had at that time gained appellate court approval…
>
> …Kudina and CitiMortgage are the identical parties as in the previous federal litigation. Though MERS was not, MERS was clearly listed in the same loan documents at issue here, and could have been made a party. Kudina opted to leave MERS out of the litigation.
>
> Quality Loan Services, although likewise not a party to the prior litigation, have supplanted Northwest Trustee Services, and perform the same function. Claims against the trustee service at the time of the prior litigation could have been pursued in federal court, again Kudina opted against pursuing this route. Simply because CitiMortgage now has hired an entity separate from Northwest Trustee Services to perform enforcement services, it does not give new life to claims Kudina should have brought in the federal litigation.

CP 536-537, emphasis in original. This appeal followed.

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D. SUMMARY OF ARGUMENT

Res judicata, otherwise known as claim preclusion, bars Kudina from bringing her claims in the current case because those claims were either brought or could have been brought in the District Court case. Kudina argues that she could not have brought the claims in the District Court case because she is not an attorney, and because the *Bain* case had not yet been decided. These arguments fail. *Res judicata* bars Kudina from bringing her current claims because the causes of action and parties are identical in the current case and District Court case. Kudina is not entitled to special consideration or another chance to litigate simply because she chose to appear *pro se* in the District Court case and the *Bain* decision does not provide Kudina with a second chance. Although Kudina argues her claims are not barred by collateral estoppel, the application of collateral estoppel is not before this Court, does not apply, and would preclude the claims Kudina asserts in the current case if it did apply. The Superior Court properly granted CMI's and MERS' CR 12(b)(6) motion to dismiss and this Court should affirm.

E. ARGUMENT

1. Standard Of Review

A superior court's decision to grant a CR 12(b)(6) motion to dismiss is a question of law that is reviewable de novo. *Cutler v. Phillips*

Petroleum Co., 124 Wash.2d 749, 755. 881 P.2d 216 (1994). The factual allegations of a complaint must be accepted as true for purposes of a CR 12(b)(6) motion to dismiss for failure to state a claim. But dismissal is proper where it is clear from the complaint that the allegations set forth do not support a claim. *Berge v. Gorton*, 88 Wash.2d 756, 759, 567 P.2d 187 (1977). In considering the motion, the Court may take judicial notice of matters of public record. *Id*., at 763.

2. Res Judicata, Otherwise Known as Claim Preclusion, Bars Kudina From Bringing Her Claims in the Current Case Because Those Claims Were Either *Brought or Could Have Been Brought* in the District Court Case.

a. Kudina Makes Only Two Arguments Regarding Why She Could Not Bring All of Her Claims Against CMI, MERS, and the Trustee in the District Court Case: (1) Because She is Not an Attorney; and (2) Because the *Bain* Case Had Not Yet Been Decided. Both Arguments Fail.

"Filing two separate lawsuits based on the same event is precluded under Washington law." *Emeson v. Department of Corrections,* 194 Wash.App. 617, 626 (Div. II 2016); *Knuth v. Beneficial Washington, Inc.,* 107 Wash.App. 727, 731, 31 P.3d 694 (Div. I 2001). Claim preclusion "is designed to 'prevent relitigation of already determined causes and curtail multiplicity of actions and harassment in the court.'" *Loveridge v. Fred Meyer, Inc.*, 125 Wash.2d 759, 763, 887 P.2d 898 (1995), *quoting Bordeaux v. Ingersoll Rand Co.*, 71 Wash.2d 392, 395, 429 P.2d 207

(1967). *Res Judicata*, or claim preclusion, also ensures the "integrity and finality in the legal system." *Knuth v. Beneficial*, 107 Wash.App. at 731, *citing, Pederson v. Potter*, 103 Wash.App. 62, 71, 11 P.3d 833 (Div. III 2000).

Res Judicata requires a final judgment on the merits. *Ensley v. Pitcher*, 152 Wash.App. 891, 899-901, 222 P.3d 99 (Div. I 2009). Summary judgment is "a final judgment on the merits with the same preclusive effect as a full trial, and is therefore a valid basis for application of res judicata." *Id.* at 899, citing *DeYoung v. Cenex Ltd.*, 100 Wash.App. 885, 892, 1 P.3d 587 (Div. III 2000).

The doctrine applies not only to claims that were brought in the prior action, but importantly here, claims that *could have and should have been brought* in the prior action. *DeYoung v. Cenex Ltd.*, 100 Wash.App. at 891-92. Claim preclusion "applies to matters that were actually litigated and those that 'could have been raised, and in the exercise of reasonable diligence should have been raised, in the prior proceeding.'" *Id., quoting, Kelly-Hansen v. Kelly-Hansen*, 87 Wash.App. 320, 328-29, 941 P.2d 1108 (Div. II 1997).

In the District Court case, Kudina denied she was in default on her loan, asserted improper collection on a debt, and asserted wrongful attempts to foreclose. That relief was denied with prejudice, and as a

result, the doctrine of *res judicata* / claim preclusion now prevents her from bringing a subsequent action.

More importantly are the allegations or facts Kudina now alleges are "new" or "different." First, Kudina does not bring new causes of action in the current case. See section E.2.b., below. In her response to CMI's and MERS' motion to dismiss in the current case, and in her Opening Brief before this Court, Kudina goes to great lengths to attempt to explain, in detail, exactly how her amended complaint in the current case differs from the complaints she filed *pro se* in the District Court case.[5]

But it does not matter if new or different facts are asserted in the current case if they "could have been raised, and in the exercise of reasonable diligence should have been raised" in the District Court case. All of Kudina's claims arise out of the same events, and Kudina does not and cannot show that any of the allegedly new or different facts asserted in the current case could not have been discovered (or that they were not discovered) during the pendency of the District Court action.

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[5] For example, she argues "she asserted, for the first time through counsel, claims which were different than those which she raised in her prior *pro se* litigation;" and "These claims were not before the Federal court in the prior *pro se* action." Appellant Kudina's Opening Brief, p. 15, 17.

Assuming, for purposes of the CR 12(b)(6) motion, that all allegations and facts in the current amended complaint are true, Kudina has not shown any of them were unknown or unknowable in 2010 when she filed the District Court action. She simply argues that these "facts were unknown to Appellant at the time she filed the *pro se* Federal action and could not have been known to her as she was not (and is not) an attorney." Appellant Kudina's Opening Brief, p. 19-20. Further, Kudina speculates that because the *Bain* decision had not yet been rendered, "had Appellant made such arguments in her *pro se* Federal action 'without appellate court approval,' Respondent Citi would have complained that the arguments 'lacked merit or legal support,' and Appellant may have opened herself up to sanction."[6] These arguments and speculation are insufficient to prevent the application of *res judicata* to bar Kudina's claims in the current case.

It was Kudina's choice not to hire counsel at any point in the District Court case. Had she done so, she could have made any of the arguments she now wants a chance to make, including any of the arguments the plaintiff in the *Bain* case made to the District Court prior to the Washington Supreme Court's decision in 2012. In fact, the *Bain* case was decided during the pendency of Kudina's Ninth Circuit appeal of the

[6] *Id.*, p. 21. Also see sections E.2.c. and d., below.

District Court case, and she brought it to the Circuit Court's attention as supplemental authority. The Court found it "unpersuasive." CP 443. To the extent that Kudina could have, but failed to, make "better" or different arguments before either the District Court or Ninth Circuit Court, that was by her choice, and wholly within her control. The fact that she has now hired an attorney and the *Bain* decision was decided does not give her a new "bite at the apple."

The Note, Deed of Trust, and Assignment of the Deed of Trust that are at the center of the current case are the same documents at issue in the District Court case. All of the arguments Kudina makes in the current case flow from these documents. See, for example, the argument, that the Assignment of the Deed of Trust was fraudulent and "did not serve to transfer any interest in the DOT to Defendant CMI." CP 153. Kudina's amended complaint states that the Assignment was recorded on November 30, 2010. *Id*. Also see, CP 186. This was a month before she filed the District Court case and almost six years before she filed her amended complaint in the current case. There is no explanation offered for why she could not have made this argument in 2010, other than that she is not a lawyer and the *Bain* decision was not yet decided. The analysis is the same for any allegations and argument that Kudina could have made in the District Court case, to the extent she did not.

In 2010 Kudina was also aware of the trustee's role and knew, or should have known, of MERS' – yet she chose to name neither as parties to her suit. Again, the only explanation offered is that she is not an attorney and the timing of *Bain*.

With reasonable diligence, MERS and the trustee could have been named in the District Court case. And all of the claims and facts alleged in the amended complaint in the current case either were, or could have been, raised in the District Court case. Claim splitting is precluded in Washington as is relitigating matters that could have been filed in the earlier case. *Ensley v. Pitcher,* 152 Wash.App. at 898. The Superior Court properly granted CMI's and MERS' motion to dismiss.

b. Res Judicata/Claim Preclusion Bars Kudina From Bringing Her Claims in the Current Case Because The Cause of Action and Persons and Parties are Identical.

Res judicata, or claim preclusion, applies:

> when a prior judgment has a concurrence of identity in four respects with a subsequent action. There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made.

Knuth v. Beneficial Washington, Inc., 107 Wash.App. at 731. Kudina, in her response to CMI's and MERS' 12(b)(6) motion, and in her Opening Brief, only argues elements (2) and (3), thus conceding that there is a

concurrence of identity of subject matter (element 1) and identity of the quality of the persons for whom or against whom the claim is made (element 4).[7]

(1) Identical Cause of Action.

Kudina's only argument regarding identity of cause of action is that the current case allegedly involves facts or claims that "were not before the Federal court in the prior *pro se* action" and are brought in the current case "by Appellant's first ever counsel." She provides no explanation as to why these facts or claims could not have been asserted in the District Court action, other than that she did not have counsel at the time. Appellant's Opening Brief, p. 16-17.

Res judicata bars claims that could have been raised, and in the exercise of reasonable diligence should have been raised by Kudina, in the District Court case. Kudina cannot now bypass application of the doctrine simply by adding allegations to the current case that she could have and should have included in the District Court case, and then arguing that because there is a difference between the federal pleading and the state court pleading that identity is different

[7] CP 448 ("[T]he application of res judicata in a subsequent action requires concurrence of (a) subject matter; (b) cause of action; (c) people and parties; and (d) 'quality of persons for or against whom the claim is made.'…Defendant CMI has not and cannot satisfy elements (b) and (c)."); Appellant's Opening Brief, p. 15.

While identity of causes of action "cannot be determined precisely by mechanistic application of a simple test," *Abramson v. University of Hawaii*, 594 F.2d 202, 206 (9th Cir.1979), the following criteria have been considered:

> (1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.
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> *Constantini v. Trans World Airlines*, 681 F.2d 1199, 1201–02 (9th Cir. 1982), *cert. denied*, 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed.2d 932 (1982), *quoting, Harris v. Jacobs*, 621 F.2d 341, 343 (9th Cir. 1980)).

Rains v. State of Washington, 100 Wash.2d 660, 663-64, 674 P.2d 165 (1983).

(a) Criteria 1 – CMI's Rights Would be Destroyed or Impaired by Allowing Kudina to Prosecute the Current Case.

Kudina brought the District Court case to stop CMI from foreclosing, and she brings the current case for the same reason. Kudina wants a second chance to make "better" or different arguments she failed to make before, without a distinguishing change in circumstance from the District Court case other than that she retained counsel. This undoubtedly

injures or impairs CMI's rights and interests. Anything Kudina now, through counsel, advances in the current case as "new" or "different" could have and should have been (and in some cases, was) raised in the District Court case. "The purpose of res judicata is to ensure the finality of judgments and eliminate duplicitous litigation." *Landry v. Luscher*, 95 Wash.App. 779, 783, 976 P.2d 1274 (Div. III 1999), *citing Hayes v. City of Seattle*, 131 Wash.2d 706, 711-12, 934 P.2d 1179 (1997) and *Kuhlman v. Thomas*, 78 Wash.App. 115, 120, 897 P.2d 365 (Div.I 1995).

(b) Criteria 2 – The Evidence in Both Proceedings Is Identical.

The evidence relied upon in both proceedings (the Note, Deed of Trust, her payment history) is identical. Although she did not specifically cite to the Assignment of the Deed of Trust in the District Court complaints, she described CMI in that proceeding as the "successor to the mortgagee bank." (CP 258). She brought the *Bain* decision, once decided, to the Ninth Circuit's attention. CP 443. As noted above, allegations and argument regarding MERS' role both could have been and should have been raised in the District Court case. The Assignment is not "new" evidence but 'evidence' and 'claims' that could have been brought earlier.

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(c) Criteria 3 – Both the Current Case and the District Court Case Involve the Deprivation of Kudina's Interest in Her Residential Real Property.

Although Kudina now attempts to make "better" or different arguments, these arguments aim to stop foreclosure on Kudina's property. The District Court case also was filed and prosecuted to stop foreclosure on the same property. As argued above, Kudina could have and should have made those arguments in the District Court case. She is not entitled to another chance simply because she now has counsel.

(d) Criteria 4 – Both the Current Case and the District Court Case Involve the Same Transactional Nucleus of Facts.

"Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes. *Sound Built Homes, Inc. v. Windermere Real Estate/South, Inc*., 118 Wash.App. 617, 631, 72 P.3d 788 (Div. II 2003), *citing Restatement (Second) of Judgments*, § 24 cmts. A-b (1982). Here, the Note, Deed of Trust, Assignment of the Deed of Trust, and CMI's and Kudina's action or inaction with regard to same all occurred prior to filing of the District Court case. They are inextricably woven together and form a convenient unit for trial purposes. The fact that Kudina could have, but failed to, make certain or better arguments

below is irrelevant for purposes of application of *res judicata*.

(2) Identical Person and Parties.

CMI and Kudina were parties to the District Court Case and are parties to the current case. CP 240, 252, 3, and 146. In the current case, Kudina reprises her role as the plaintiff seeking to prevent foreclosure, and CMI reprises its role as the defendant seeking to foreclose. That is borne out by the relief sought by Kudina in the current case. She seeks a declaration, *inter alia,* that:

> (a) Defendant CMI is not the owner or holder of and has no rights in the Note;
> (b) Defendant CMI is not the owner of and has no rights in the (Deed of Trust); (and)
> (c) The (November 17, 2010 Assignment of Deed of Trust) is null, void, and of no force and effect.

CP 159-160. "The rule of identity of parties does not demand that each party be a named party in both proceedings. The rule may benefit one in control of the litigation." *Eugster v. Washington State Bar Association*, 198 Wash.App. 758, 787, 397 P.3d 131 (Div. III 2017).

In the current case, Kudina cannot prosecute claims against MERS or QLS without relitigating the claims she brought in the District Court case against CMI. Kudina's own failure to name MERS or the trustee in the District Court case should not be the basis for a new chance to make the arguments she should have, but failed to, make in the prior litigation.

"To hold otherwise would permit repeated litigation of the same charge based on the same facts by merely substituting a different named party." *Id*.

Kudina's claims against QLS in the current case appear to be based on it allegedly being the "successor trustee" to Northwest Trustee Services, Inc. CP 159. Kudina alleged in the District Court case that "Defendant's agent, Northwest Trustee Services, Inc. has now again initiated foreclosure proceedings…based on the false premise that the debtor is in default…" CP 241. Again, Kudina could have named the trustee in the District Court case, but chose not to. "Identity of parties is not a mere matter of form, but of substance." *Rains v. State of Washington*, 100 Wash.2d at 664 (internal citations omitted). Because QLS and Northwest Trustee Services, Inc. are qualitatively the same, Kudina's claims against QLS are barred by the doctrine of *res judicata*. *Id*. Also see, *Pederson v. Potter*, supra.

c. Kudina is not Entitled to Special Consideration or Another Chance to Litigate Simply Because She Chose to Appear *Pro Se* in the District Court Case.

It seems clear, having retained counsel, that Kudina now appreciates the consequences of not having done so before. Respectfully, this should not and cannot be grounds for allowing a once *pro se* litigant a second chance to "get it right."

"(A) litigant appearing pro se * * * is bound by the same rules of procedure and substantive law as everyone else." *Bly v. Henry*, 28 Wash.App. 469, 471, 624 P.2d 717 (Div. I 1981). See also *Anderson v. Hession*, 179 Wash.App. 1030, *2 (Div. III 2014).[8] ("At the same time, a pro se litigant is not entitled to favoritism and must follow the rules established by this court for an orderly appeal process.").

As stated in section E.2.a., above, Kudina could have hired counsel at any point during the pendency of the District Court case. She could have named MERS and the trustee, and she could have alleged all of the facts and made all of the arguments she makes in the current case. It was her choice, and regretting that choice now does not give new life to claims otherwise barred by the doctrine of *res judicata*. The Superior Court properly granted CMI's and MERS' motion to dismiss.

d. The *Bain* Decision Does Not Provide Kudina with a Second Chance.

As discussed above, *Bain v. Metropolitan Mortgage*, 175 Wash.2d 83, 285 P.3d 34 (2012), was decided during the pendency of Kudina's appeal of the District Court case. She provided it as supplemental authority to the Ninth Circuit Court of Appeals, which found it

[8] *Hession* is an unpublished opinion, which "may be cited as non-binding (authority), if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate." GR 14.1.

"unpersuasive." CP 443. To the extent this may have been because Kudina did not make the arguments ultimately deemed successful in *Bain* in her briefs to the Ninth Circuit Court or in the District Court case, again, that does not mean she could not have, or that once the decision issued, she was entitled to a new opportunity to argue her claims.

In *Salmon v. MERS*,[9] the superior court granted MERS' CR 12(b)(6) motion based on res judicata and collateral estoppel. *Id*., *1. The motion was based on plaintiffs' prior attempts to litigate the foreclosure of their home. *Id*. Division III of the Court of Appeals noted that the *Bain* decision did not trump the application of *res judicata* because the same arguments could have been made in the prior litigation:

> Since [the Salmons' 2010 litigation], our supreme court issued a decision favoring the Salmons' legal theory in *Bain v. Metropolitan Mortgage Group*, 175 Wn.2d 83, 285 P.3d 34 (2012). However, res judicata prohibits the Salmons from reopening their litigation based on Bain. The Salmons could have appealed their 2010 judgment, relying on arguments ultimately deemed successful in Bain. Because they did not, they are barred from relitigating the issue of whether MERS acted unlawfully in assigning the deed of trust to the Salmons' property, regardless of how their claims are captioned.

Id., *2.

[9] 197 Wash.App. 1067 (Div. III 2017). *Salmon* is an unpublished opinion, which "may be cited as non-binding (authority), if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate." GR 14.1.

As noted in section E.2.a., above, there is no reason why Kudina could not have asserted in the District Court case the same facts and made the same arguments she makes in the current case. There is no reason why she could not have made the arguments ultimately deemed successful in the *Bain* case to the District Court. "If prior judgments could be modified to conform with subsequent changes in judicial interpretations, we might never see the end of litigation. * * * That is precisely what the doctrine of res judicata precludes." *Columbia Rentals v. State of Washington*, 89 Wash.2d 819, 823, 576 P.2d 62 (1978). See also *Lynn v. State of Washington*, 130 Wash.App. 829, 836, 125 P.3d 202 (Div. I 2005). ("The res judicata effect of final decisions already rendered is not affected by subsequent judicial decisions giving new interpretations to existing law.")

The *Bain* decision does not provide Kudina with a new opportunity to litigate her claims. The superior court properly granted CMI's and MERS' motion to dismiss.

3. The Application of Collateral Estoppel is Not Before this Court, Does Not Apply, And Would Preclude the Claims Kudina Asserts in the Current Case If It Did Apply.

a. The Application of Collateral Estoppel is Not Before This Court.

In her Opening Brief, Kudina attempts to characterize the issues on appeal under the doctrine of collateral estoppel, not just *res judicata*. For

example, she states "the trial court's two-page April 21, 2016 Decision and Order is grounded upon two bases, which appear to be some form of either res judicata or collateral estoppel although the Decision and Order do not mention these concepts." Appellant Kudina's Opening Brief, p. 14. She states, "the trial court's application of collateral estoppel worked a substantial injustice on Appellant…" and "the trial court improperly applied res judicata and/or collateral estoppel." *Id*., p. 11, 22.

Application of the doctrine of collateral estoppel is not at issue in this appeal. The trial court clearly and unequivocally ruled only that the doctrine of res judicata bars Kudina's claims, and it is that ruling that is before this Court. CMI's and MERS' motion to dismiss only raised claim preclusion and specifically noted in the reply in support of that motion that issue preclusion or collateral estoppel "is not at issue here." CP 225-236, 465.

The trial court ruled "The Court grants Defendants CitiMortgage's Motion to Dismiss filed October 3, 2016, **for the reasons set forth therein**. Specifically, Plaintiff is **precluded from re-litigating claims** that were brought or *could have been brought* in the prior federal litigation." CP 536 (bold emphasis added, italic emphasis in original). Although Kudina attempts to characterize the scope of the present dispute as including collateral estoppel or issue preclusion, in fact, she really asks

this Court, using issue preclusion analysis, to allow her to proceed with all of her claims, even though they are barred by *res judicata*.

b. Collateral Estoppel Does Not Apply Because Kudina is not Asserting Different Claims or Causes of Action In the Current Case.

> The doctrine of collateral estoppel differs from *res judicata* in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted.
>
> ***
>
> Affirmative answers must be given to the following questions before collateral estoppel is applicable: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

Rains v. State of Washington, 100 Wash.2d at 665 (internal citations omitted).

Collateral estoppel does not apply because Kudina does not bring different claims or causes of action in the current case. In the District Court case, she brought claims for injunctive relief and damages and styled the case as a "Complaint for…Declaratory Judgment." CP 240. She asserted that she was not in default on the loan and that CMI was

wrongfully (and fraudulently) attempting to foreclose. In the current case, Kudina requests injunctive and declaratory relief and seeks damages. She asserts that she is not in default on the loan and that CMI is wrongfully (and fraudulently) attempting to foreclose. Because the District Court case and current case involve the same claims, collateral estoppel analysis does not apply.

c. Even If She Were Bringing Different Claims in the Current Case, They Would Be Barred Under the Doctrine of Collateral Estoppel.

As discussed above, the issues decided in the District Court case were identical to those brought in the current case. There was a final judgment on the merits and the parties in the current case were parties or in privity with a party to the prior adjudication.[10] And the application of the doctrine would not be unjust. Kudina chose not to hire counsel at any point during the pendency of the District Court case. Had she done so, she could have asserted all of the arguments and facts she now makes in the current case.

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[10] See, section E.2.b.(2), above. In her Opening Brief, Kudina concedes the second and third prongs of the collateral estoppel test (whether there was a final judgment on the merits, and whether the party against whom the plea asserted was a party or in privity with a party to the prior adjudication). See, Appellant Kudina's Opening Brief, p. 17-18.

F. CONCLUSION

Res judicata bars Kudina from bringing her claims in the current case because those claims were either brought or could have brought in the District Court case. Kudina is not entitled to special consideration or another chance to litigate simply because she chose to appear *pro se* in the District Court case and the *Bain* decision does not provide Kudina with a second chance. Although Kudina argues her claims are not barred by collateral estoppel, the application of collateral estoppel is not before this Court, does not apply, and would preclude the claims Kudina asserts in the current case if it did apply. The superior court properly granted CMI's and MERS' CR 12(b)(6) motion to dismiss, and as a result, its decision should be affirmed.

Dated this 21st day of September, 2017.

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I hereby certify that on the date shown I electronically filed the attached BRIEF using the Court's Appellate e-filing system and delivered same by electronic service to:

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